YKK (M) Sdn Bhd v Pengarah Tanah dan Galian Johor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-23–08 OF 2019(J)
ABDUL RAHMAN SEBLI, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ
16 JULY 2021

Land Law — Lease — Renewal of lease — Option to renew for new term — Refusal to extend by state authority — Whether option to renew clause created contractual right — Whether lease enforceable by private law — Whether appellant was afforded legitimate expectation for lease to be renewed — Whether specific performance was sustainable against respondent — Whether relief by appellant for issuance of Form 12A ought to be granted — Whether option to renew clause conformable to law — National Land Code ss 78(3) & 90A — Government Proceedings Act 1956 s 29

On 31 July 1960, the state authority alienated a piece of land ('the land'), located in the Larkin Industrial Area where a number of factories were situated, to Sri Kemajuan Co Ltd for a term of 60 years ('the lease'). The lease was issued in Form 11A of the National Land Code ('the NLC') and was supposed to expire on 30 July 2020. However, before the expiry of the lease, it was acquired by the appellant ('the plaintiff'). The plaintiff registered the lease on 9 March 1980, acquiring more than 40 years of the unexpired portion of the lease. Clause 7 of the special conditions of the lease provided the plaintiff with an option to renew the lease for a new term of 30 years ('option to renew'). On 13 March 2014, the respondent ('the defendant') informed the plaintiff that they would be issuing a notice to all the factory owners that the defendant would not be renewing the leases in the Larkin Industrial Area to give effect to the State Government's future development plans for the area. Subsequently, the defendant informed the plaintiff that the state authority had decided to convert the Larkin Industrial Area into a housing area and had accordingly, frozen all lease renewal applications. Despite being notified by the defendant that it would not be renewing the lease of the land in the Larkin Industrial Area, the plaintiff gave notice to the defendant on 24 August 2015, to exercise the option to renew under cl 7. The plaintiff alleged that the defendant had refused to provide the relevant renewal forms, including Form 12A, to the plaintiff despite various attempts to obtain them. The plaintiff filed an originating summons which sought for, inter alia, specific performance of cl 7. The High Court granted judgment in favour of the plaintiff. However, upon appeal to the Court of Appeal, the judgment of the High Court was reversed. Hence this appeal by the plaintiff with the following question of law: whether the alienation of a qualified title by way of a lease by a state authority under the

NLC gave rise to a contract of lease between the state authority and the lessee that was enforceable in private law.

Held, dismissing the appeal with costs of RM80,000:

(1) The alienation of land by the state authority could not give rise to a contract of lease which was in contravention with the NLC. The learned trial judge had erred in law when he held that the defendant was bound by cl 7 'thereby giving up the discretion it may have in respect of renewing the lease'. Even if cl 7 had such an effect, it would not be binding on the state authority, as it was not in accordance to the NLC, namely s 90A, as it prevented the state authority from exercising its statutory discretion or performing its statutory duty. As for the renewal of a lease, s 90A(1) and (5) of the NLC expressly provided for the discretion of the state authority whether to approve or reject any application for the renewal of the lease. The interpretation of cl 7 as suggested by the plaintiff that it created a binding obligation on the defendant to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease, was contrary to the provisions of the NLC, ie ss 78(3) and 90A of the NLC. A plain reading of cl 7 showed that, it did not impose a mandatory obligation on the state authority to grant an extension of the lease for a further term upon the plaintiff exercising its option to renew. The construction as accorded by the plaintiff to cl 7 was unsustainable. Clause 7 did not create a contractual lease between the state authority and the lessee which was binding on the state authority (see paras 38–39, 49–50 & 57–58).

(2) Although at first blush it appeared that it concerned a breach of condition in a lease, which may seem to be a private law matter, essentially the action by the plaintiff was a challenge on the decision of the state authority in refusing to renew the lease. The state authority performed a public function and had to exercise its discretion taking into account public interest. Further, a perusal of the reliefs prayed for, by the plaintiff, showed that the prayers predominantly fell within the realm of public law. The decision made by the state authority would not only affect the title of the plaintiff but also affect the other titles within the Larkin area. As the plaintiff was challenging the decision of a public body, the plaintiff could have commenced this action by way of a judicial review application since the public law element was evidently predominant. Therefore, the plaintiff's claim in private law remedy was clearly unsustainable. The lease was not enforceable by private law (see paras 75, 77, 79 & 90–91).

(3) Clause 7 must be viewed in the context of the scheme of the NLC as a whole. The state authority could not contractually fetter its powers of discretion, given the expressed provision of s 90A of the NLC as that would amount to exceeding his statutory powers. In addition, until and

unless there was registration of the interest on the land, the land shall remain as State land. There was nothing that was before the court that showed that the state authority had acted in excess of the powers given to it by Parliament in the NLC. Therefore cl 7 did not accord the plaintiff a legitimate expectation for the lease to be renewed, as legitimate expectation could not override the express statutory provisions of the NLC (see paras 102 & 104–105).

(4) As the relief sought by the plaintiff was a specific performance against the Director of Lands and Mines, who was an officer of the state authority, which was a Government body, such relief was not sustainable pursuant to s 29 of the Government Proceedings Act 1956. Hence the relief of specific performance was not sustainable against the defendant (see paras 108–109).

(5) There was never any instance in this case, that the title was ever surrendered to the defendant. As the lease had already expired, the subject land reverted and vested to the state authority. Apart from the provisions of the NLC which related to the surrender of title and re-alienation thereof of the subject land, once the land was surrendered and vested to the state authority, the land became free from any conditions or restrictions or interest or title and all buildings built on the land were subjected to state authority. Any condition or restriction with regards to the subject land would no longer exist which included cl 7 which had been endorsed on the plaintiff's title (see paras 112 & 114).

(6) To construe cl 7 as suggested by the plaintiff would deprive the state authority of the control over State land. That construction would have the effect of overriding the statutory provisions of s 90A(5) of the NLC specifically, where the discretion was on the state authority to approve any renewal of a lease for a further term. Taking that interpretation of cl 7 would render cl 7 to be not conformable to law. A plain reading of the wordings of cl 7 did not give the effect that, it was mandatory for the defendant to grant an automatic renewal of the lease for a further term upon the plaintiff exercising its option to renew. Clause 7 merely provided for the plaintiff to exercise its option to renew the lease before the expiry of the term, but it did not mandate the state authority to grant an automatic renewal to the plaintiff. Hence, the argument that cl 7 was ultra vires or not in conformable to law did not arise (see paras 119–121).

[Bahasa Malaysia summary

Pada 31 Julai 1960, pihak berkuasa negeri memberi milik sebidang tanah ('tanah'), yang terletak di Kawasan Perindustrian Larkin di mana beberapa kilang terletak, kepada Sri Kemajuan Co Ltd untuk tempoh 60 tahun ('pajakan'). Pajakan itu dikeluarkan dalam Borang 11A Kanun Tanah Negara ('KTN') dan sepatutnya tamat pada 30 Julai 2020. Walau bagaimanapun,

sebelum tamat tempoh pajakan, ia telah diperoleh oleh perayu ('plaintif'). Plaintif telah mendaftarkan pajakan pada 9 Mac 1980, memperoleh lebih daripada 40 tahun bahagian pajakan yang belum luput. Klausa 7 syarat khas pajakan memperuntukkan pilihan kepada plaintif untuk memperbaharui pajakan untuk tempoh baharu selama 30 tahun ('pilihan untuk memperbaharui'). Pada 13 Mac 2014, responden ('defendan') memaklumkan plaintif bahawa mereka akan mengeluarkan notis kepada semua pemilik kilang bahawa defendan tidak akan memperbaharui pajakan di Kawasan Perindustrian Larkin untuk memberi kesan kepada rancangan pembangunan akan datang Kerajaan Negeri di kawasan tersebut. Selepas itu, defendan memaklumkan plaintif bahawa pihak berkuasa negeri telah memutuskan untuk menukar Kawasan Perindustrian Larkin menjadi kawasan perumahan dan dengan itu telah membekukan semua permohonan pembaharuan pajakan. Walaupun dimaklumkan oleh defendan bahawa ia tidak akan memperbaharui pajakan tanah di Kawasan Perindustrian Larkin, plaintif telah memberi notis kepada defendan pada 24 Ogos 2015, untuk melaksanakan pilihan untuk memperbaharui di bawah klausa 7. Plaintif mendakwa bahawa defendan telah enggan memberikan borang pembaharuan yang berkaitan, termasuk Borang 12A, kepada plaintif walaupun terdapat pelbagai percubaan untuk mendapatkannya. Plaintif memfailkan saman pemula yang menuntut, antara lain, pelaksanaan spesifik klausa 7. Mahkamah Tinggi memberikan penghakiman yang memihak kepada plaintif. Bagaimanapun, selepas rayuan kepada Mahkamah Rayuan, penghakiman Mahkamah Tinggi telah diakas. Oleh itu rayuan ini oleh plaintif dengan persoalan undang-undang berikut: sama ada pemberian milik yang memenuhi syarat melalui pajakan oleh pihak berkuasa negeri di bawah KTN menimbulkan kontrak pajakan antara pihak berkuasa negeri dan pemajak yang boleh dikuatkuasakan dalam undang-undang persendirian.

Diputuskan, menolak rayuan dengan kos RM80,000:

(1) Pemberian milik tanah oleh pihak berkuasa negeri tidak boleh menimbulkan kontrak pajakan yang bercanggah dengan KTN. Hakim bicara yang bijaksana telah terkhilaf dalam undang-undang apabila beliau berpendapat bahawa defendan terikat dengan klausa 7 'dengan itu melepaskan budi bicara yang mungkin ada dalam memperbaharui pajakan'. Walaupun klausa 7 mempunyai kesan sedemikian, ia tidak akan mengikat pihak berkuasa negeri, kerana ia tidak menurut KTN, iaitu s 90A, kerana ia menghalang pihak berkuasa negeri daripada melaksanakan budi bicara statutorinya atau melaksanakan kewajipan statutorinya. Bagi pembaharuan pajakan, s 90A(1) dan (5) KTN dengan jelas memperuntukkan budi bicara pihak berkuasa negeri sama ada untuk meluluskan atau menolak sebarang permohonan untuk pembaharuan pajakan. Tafsiran klausa 7 seperti yang dicadangkan oleh plaintif bahawa ia mewujudkan kewajipan mengikat ke atas defendan

untuk memberikan pajakan baharu untuk tempoh 30 tahun selepas plaintif memberi notis, membayar premium yang sesuai dan menyerahkan pajakan semasa, adalah bertentangan dengan peruntukan KTN, iaitu ss 78(3) dan s 90A KTN. Bacaan biasa klausa 7 menunjukkan bahawa, ia tidak mengenakan kewajipan mandatori kepada pihak berkuasa negeri untuk memberikan lanjutan pajakan untuk tempoh selanjutnya apabila plaintif melaksanakan pilihannya untuk memperbaharui. Pembinaan seperti yang diberikan oleh plaintif kepada klausa 7 adalah tidak dapat dipertahankan. Klausa 7 tidak mewujudkan pajakan kontrak antara pihak berkuasa negeri dan pemajak yang mengikat pihak berkuasa negeri (lihat perenggan 38–39, 49–50 & 57–58).

(2) Walaupun pada mulanya kelihatan bahawa ia melibatkan pelanggaran syarat dalam pajakan, yang mungkin kelihatan sebagai perkara undang-undang persendirian, pada dasarnya tindakan plaintif adalah satu cabaran terhadap keputusan pihak berkuasa negeri dalam enggan memperbaharui pajakan itu. Pihak berkuasa negeri melaksanakan fungsi awam dan perlu menggunakan budi bicaranya dengan mengambil kira kepentingan awam. Selanjutnya, penelitian terhadap relif yang dipohon, oleh plaintif, menunjukkan bahawa permohonan tersebut kebanyakannya berada dalam bidang undang-undang awam. Keputusan yang dibuat oleh pihak berkuasa negeri itu bukan sahaja menjejaskan hak milik plaintif tetapi juga memberi kesan kepada hakmilik lain dalam kawasan Larkin. Memandangkan plaintif mencabar keputusan badan awam, plaintif boleh memulakan tindakan ini melalui permohonan semakan kehakiman memandangkan unsur undang-undang awam jelas dominan. Oleh itu, tuntutan plaintif dalam remedi undang-undang persendirian jelas tidak dapat dipertahankan. Pajakan tidak boleh dikuatkuasakan oleh undang-undang persendirian (lihat perenggan 75, 77, 79 & 90–91).

(3) Klausa 7 mesti dilihat dalam konteks skema KTN secara menyeluruh. Pihak berkuasa negeri tidak boleh secara kontrak menyekat kuasa budi bicaranya, mengambil kira peruntukan yang dinyatakan dalam s 90A KTN kerana ini berjumlah melebihi kuasa statutorinya. Di samping itu, sehingga dan melainkan terdapat pendaftaran kepentingan ke atas tanah itu, tanah itu hendaklah kekal sebagai tanah Negeri. Tiada apa-apa di hadapan mahkamah yang menunjukkan bahawa pihak berkuasa negeri telah bertindak melebihi kuasa yang diberikan kepadanya oleh Parlimen dalam KTN. Oleh itu klausa 7 tidak memberikan plaintif jangkaan sah untuk pajakan diperbaharui, kerana jangkaan sah tidak dapat mengatasi peruntukan statutori jelas KTN (lihat perenggan 102 & 104–105).

(4) Memandangkan relif yang dipohon oleh plaintif adalah satu pelaksanaan spesifik terhadap Pengarah Tanah dan Galian, yang merupakan seorang

pegawai pihak berkuasa negeri, yang merupakan badan Kerajaan, relif tersebut tidak dapat dipertahankan menurut s 29 Akta Prosiding Kerajaan 1956. Oleh itu relif pelaksanaan spesifik tidak dapat dipertahankan terhadap defendan (lihat perenggan 108–109).

(5) Tiada apa-apa keadaan dalam kes ini, bahawa hakmilik itu pernah diserahkan kepada defendan. Memandangkan pajakan telah pun tamat, tanah subjek dikembalikan dan terletak hak kepada pihak berkuasa negeri. Selain daripada peruntukan KTN yang berkaitan dengan penyerahan hakmilik dan pemberian semula milik ke atas tanah subjek, sebaik sahaja tanah itu diserahkan dan terletak hak kepada pihak berkuasa negeri, tanah tersebut menjadi bebas daripada sebarang syarat atau sekatan atau kepentingan atau hak milik dan semua bangunan yang dibina di atas tanah itu tertakluk kepada pihak berkuasa negeri. Sebarang syarat atau sekatan berkenaan dengan tanah subjek tidak akan wujud lagi termasuk klausa 7 yang telah disahkan pada hakmilik plaintif (lihat perenggan 112 & 114).

(6) Untuk menafsirkan klausa 7 seperti yang dicadangkan oleh plaintif akan melucutkan kuasa negeri daripada kawalan ke atas tanah Negeri. Tafsiran itu akan mempunyai kesan mengatasi peruntukan berkanun s 90A(5) KTN secara khusus, di mana budi bicara adalah pada pihak berkuasa negeri untuk meluluskan sebarang pembaharuan pajakan untuk tempoh selanjutnya. Mengambil tafsiran klausa 7 itu akan menjadikan klausa 7 tidak selaras dengan undang-undang. Pembacaan jelas perkataan klausa 7 tidak memberi kesan bahawa, adalah wajib bagi defendan untuk memberikan pembaharuan automatik pajakan untuk tempoh selanjutnya apabila plaintif menggunakan pilihannya untuk memperbaharui. Klausa 7 hanya memperuntukkan plaintif untuk melaksanakan pilihannya untuk memperbaharui pajakan sebelum tamat tempoh, tetapi ia tidak memberi mandat kepada pihak berkuasa negeri untuk memberikan pembaharuan automatik kepada plaintif. Oleh itu, hujahan bahawa klausa 7 adalah ultra vires atau tidak selaras dengan undang-undang tidak berbangkit (lihat perenggan 119–121).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors [2018] 1 MLJ 633, CA (refd)

Chong Pak Kwan @ Chong Shiu Fai v Kong Chung Loi @ Kong Sung Loi & others [2002] MLJU 435, HC (refd)

Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd [1978] 1 MLJ 130, FC (distd)

Cudgen Rutile (No 2) Pty Ltd and another v Gordon William Wesley Chalk [1975] AC 520, PC (folld)

Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor [2007] 4 MLJ 422; [2007] 3 CLJ 377, CA (refd)
Evergreen Frontier (M) Sdn Bhd v The Director of Lands and Surveys, Sabah & Anor [2005] 2 MLJ 644, HC (refd)
Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors [1984] 2 MLJ 123, FC (folld)
Ho Ken Seng v Progressive Insurance Sdn Bhd [2013] 2 MLJ 335; [2013] 2 CLJ 601, FC (refd)
Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors [2017] 5 MLJ 116, CA (refd)
Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal [2016] MLJU 1649, CA (refd)
Leo Leslie Armstrong (as the President and Committee of The Young Men's Christian Association of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (previously held by Majlis Mesyuarat Kerajaan Negeri Selangor) [2015] 1 MLJ 255; [2015] 2 CLJ 10, CA (distd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1, FC (refd)
Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd [2015] 2 MLJ 509; [2015] 1 CLJ 357, CA (refd)
Mercury Communications Ltd v Director General of Telecommunications [1996] 1 WLR 48, HL (refd)
Michael C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45, FC (refd)
Nadarajah and another v Secretary of State for the Home Department [2005] EWCA Civ 1363, CA (refd)
North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi [2018] supp MLJ 293; [2011] 4 CLJ 729, FC (folld)
O'Reilly v Mackman [1983] 2 AC 237, QBD (refd)
Pemungut Hasil Tanah, Kota Tinggi v United Malayan Banking Corpn Bhd [1981] 2 MLJ 264, FC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (folld)
Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213, CA (refd)
Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia [2009] 1 MLJ 676; [2009] 1 CLJ 192, CA (refd)
Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705, HL (refd)
Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5, HC (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2002] 2 MLJ 413; [2002] 2 CLJ 697, CA (not folld)
Station Hotels Berhad v Malayan Railway Administration [1977] 1 MLJ 112, FC (refd)
Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)
Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council [1997] 4 All ER 747, CA (refd)
Wandsworth London Borough Council v Winder [1985] AC 461, CA (refd)
Western Fish Products Ltd v Penwith District Council and another [1981] 2 All ER 204, CA (folld)
Yap Lai Yoke v Chin Fook Wah & connected case [1984] 2 MLJ 274, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 38(1)(a)
Domain Leasing Act 1961 [UK]
Government Proceedings Act 1956 s 29, 29(1)
Mining Act 1898 [UK] s 23A
National Land Code ss 2, 12(1), 12(3), 13, 16(2), 40, 42, 48, 76, 78, 78(3), 79(2), 80(3), 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 90A, 90A(1), (5), 91, 92, 105(2), 109, 117(1), (1)(a)(iv), (2), 120, 120(1), 124, 124(1), (2), (4), 131, 176(2), 197, 199, Forms 11A, 12A
Railway Ordinance 1948 s 4, 4(2)
Rules of Court 2012 O 15 r 16, O 53
Rules of the High Court 1980 O 18 r 19(1), O 54
Specific Relief Act 1950 s 41
Town and Country Planning Act 1971 [UK]

Appeal from: Civil Appeal No J-01(NCVC)(A)-441–11 of 2017 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (Ravindran Shanmuganathan and Chan Wei June with him) (Ho Kok Yew) for the appellant.
Madihah bt Zainol (Senior Federal Counsel, Office of the State Legal Advisor of Johor) for the respondent.

Zabariah Yusof FCJ:

INTRODUCTION

[1] The appellant, who was the plaintiff in the High Court appealed against the decision of the Court of Appeal, and obtained leave to appeal to the Federal Court on the following question of law:

Whether the alienation of a qualified title by way of a lease by a State Authority under the National Land Code, 1965 gives rise to a contract of lease between the State Authority and the lessee that is enforceable in private law.

[2] The High Court granted judgment in favor of the plaintiff. However, upon appeal to the Court of Appeal, the judgment of the High Court was reversed. Hence the appeal by the plaintiff to this court with the aforesaid question to be determined.

[3] In this judgment, parties will be referred to, as they were, in the High Court. This is the unanimous judgment of this court.

BACKGROUND

[4] On 31 July 1960, the State Authority alienated a piece of land described as HSD 4981, Lot TLO 6893, Bandar Johor Bahru, Johor ('the land') to Sri Kemajuan Co Ltd for a term of 60 years ('the lease'). The lease was issued in Form 11A of the National Land Code ('the NLC') and was supposed to expire on 30 July 2020. However, before the expiry of the lease, it was acquired by Leong Huat Hardware (Pte) Ltd and subsequently by the plaintiff. The plaintiff registered the lease on 9 March 1980, acquiring more than 40 years of the unexpired portion of the lease. The land is located in the Larkin Industrial Area where a number of factories are situated.

[5] Clause 7 of the special conditions of the lease provides the plaintiff with an option to renew the lease for a new term of 30 years ('option to renew'), which reads as follows:

7. At any time not less than six months before the date of expiration of this lease the lesee may, at his option exercised in writing and upon payment of an appropriate premium based upon the undeveloped value of the land and rent at then current rates, surrender this lease and obtain in exchange therefore a new lease for the term of 30 years from the date of his exercise of the said option. Such new lease shall be subject to all the terms and conditions of this lease except the option by this condition conferred.

[6] On *13 March 2014*, a meeting was held between the defendant and the plaintiff's representatives, wherein the defendant informed the plaintiff's representatives that they would be issuing a notice to all the factory owners that the defendant would not be renewing the leases in the Larkin Industrial Area to give effect to the State Government's future development plans for the area. Subsequently, by a letter dated *18 August 2015,* the defendant informed the plaintiff that the State Authority has decided to convert the Larkin Industrial Area into a housing area and has accordingly, frozen all lease renewal applications.

[7] Despite being notified by the defendant that it would not be renewing the lease of the land in the Larkin Industrial Area, the plaintiff gave notice to the defendant on *24 August 2015*, to exercise the option to renew under cl 7. At the same time, the plaintiff asked the defendant to inform the plaintiff of the appropriate premium based on the undeveloped value of the land and the current rental rate that is payable.

[8] The plaintiff alleged that the defendant has refused to provide the relevant renewals forms, including Form 12A, to the plaintiff despite various attempts to obtain them.

[9] Despite a reminder being issued on 12 November 2015 by the plaintiff, the defendant has, to date, not responded to the renewal notice. As a result, the plaintiff filed an originating summons which sought for, inter alia, the following orders:

(a) specific performance of cl 7 of the special conditions (prayer 1);

(b) consequent upon prayer 1, that the respondent within 14 days of the order of the High Court:

(i) issue Borang 12A in accordance to s 197 of the NLC and all other relevant and necessary forms and/or documents which are required and relevant to the plaintiff; and

(ii) inform the plaintiff of the payable sums as the appropriate premium based upon the undeveloped value of the land and the rent at the current rates,

to enable the plaintiff to surrender the lease and obtain in exchange a new lease for 30 years.
(collectively referred to as 'prayer 2')

(c) as alternative to prayer 1, the plaintiff sought declaratory reliefs and general damages.

[10] The learned High Court judge allowed prayers (1), (2)(a) and (b) as aforesaid and costs. Aggrieved by the decision of the High Court, the defendant appealed to the Court of Appeal, which was allowed. Hence the appeal by the plaintiff to this court with the questions of law to be determined.

The findings of the High Court

[11] The learned trial judge found that there is only one issue to be determined that is, whether the defendant's refusal to renew the plaintiff's lease constitutes a breach of the option to renew in cl 7 of the special conditions of the lease (cl 7).

[12] His Lordship found that cl 7 created: A

(a) a contractual right in favor of the plaintiff; and

(b) a binding obligation on the defendant to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease. B

The defendant was bound by cl 7 'thereby *giving up the discretion* it may have in respect of renewing the Lease'.

[13] The learned trial judge held that the plaintiff has legitimate expectation C of a guaranteed and an automatic right to a renewal of the lease of 30 years.

[14] The defendant, by its letter dated 18 August 2015 and by its refusal to provide the relevant renewal forms, has made it clear that it will not honor its obligation to renew the lease and is therefore, in the learned trial judge's view, D in breach of cl 7.

[15] The learned trial judge premised his interpretation based on a plain and literal reading of cl 7, which in his view is consistent with the intention of the parties. In this regard, His Lordship referred to *Michael C Solle v United* E *Malayan Banking Corporation* [1986] 1 MLJ 45 and the judgment of Raja Azlan Shah FCJ in the Federal Court case of *Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd* [1978] 1 MLJ 130, where His Lordship said:

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> ... we must construe the special conditions endorsed on the document of title as they stand and as a whole to see what is the intention of the parties ...

His Lordship relied on the High Court decision of *Evergreen Frontier (M) Sdn Bhd v The Director of Lands and Surveys, Sabah & Anor* [2005] 2 MLJ 644, G which His Lordship said was of a similar situation as in the present case and referred to what was held in that case that:

> [13] The issuance of the said letter to the plaintiff and its unconditional acceptance by the plaintiff undoubtedly constitute a binding contract between the plaintiff and the second defendant. The fact that both parties agreed on the sole issue set out above incontrovertibly implies admission of the existence of a binding contract. The H second defendant cannot, for the reasons I have stated earlier, wiggle out of the agreement to alienate the replacement land simply by issuing the withdrawal letter ...

[16] His Lordship also referred to *Chong Pak Kwan @ Chong Shiu Fai v Kong* I *Chung Loi @ Kong Sung Loi & others* [2002] MLJU 435 and said that this case makes it clear that an approved land application creates rights on behalf of the applicant which are capable of being the subject-matter of a contract. The issue in that case was 'whether there are any interest under land application capable

of being sold before the subject land are alienated to the applicants'. The stand of the defendant in that case was that, approval should involve registration of ownership or at least acceptance of the offer to alienate by the authority and nothing else. Thus, it was the defendant's view that the defendant's mere approval of land application gives nothing to the applicant. The court however held that 'equating registration to an approval is too onerous a condition. Registration is the final step in an alienation process of land under the Ordinance. Prior to registration, an approval is given in accordance with the provision of the relevant law, and in this case the Ordinance ... Since the land applications were approved there should be 'rights' conferred at the material time capable of being a subject matter of a contract'.

[17] Given the authorities as aforesaid and from the language engaged in cl 7, the learned trial judge was of the view that the words contained therein are clear and unambiguous. It shows clear intention of the State Authority to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease.

[18] The learned trial judge further held that 'even if the defendant is able to show that it possesses a power in deciding whether to renew the lease, our apex court has held that in situations where the NLC confers a power and/or discretion, the exercise of such power and/or discretion is always subject to judicial scrutiny. As such, the apex court has rejected the argument that the NLC confers an absolute power or discretion on the defendant'. For this the learned trial judge referred to the judgment of Raja Azlan Shah FJ in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, accepting what was said as the law, that s 76 of the NLC does not confer on the defendant an unfettered prerogative power, especially so in the present facts given the language of cl 7.

[19] The learned trial judge held that the defendant has exceeded its power by refusing to renew the lease and the decision was therefore unlawful, illegal and ultra vires the powers of the defendant, provisions of the NLC and a breach of the plaintiff's right under the lease.

[20] On the preliminary objection raised by the learned federal counsel on the mode of commencement, the learned trial judge disregarded it, as it was never raised in the affidavits of the plaintiff and in the alternative it was not mandatory for the plaintiff to appeal under s 418 of the NLC to challenge the decision of the Land Administrator. The learned trial judge held that, as the plaintiff's complaint was premised on a breach of its rights under cl 7, which was a private law right specific to the plaintiff, 'therefore there is no public law element involved in the facts of the present case'. His Lordship referred to *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian*

Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865 and *Leo Leslie Armstrong (as the President and Committee of The Young Men's Christian Association of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (previously held by Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 1 MLJ 255; [2015] 2 CLJ 10. Hence the plaintiff is entitled to initiate the proceeding by way of an originating summons instead of a judicial review.

Proceedings at the Court of Appeal

[21] Aggrieved with the High Court's decision, the defendant appealed against the whole decision to the Court of Appeal.

[22] The Court of Appeal held that it is misconceived to say that s 76 of the NLC read with cl 7 makes it a contractual lease, the consequence of which, private law remedy is available to renew the lease for the unexpired period. The Court of Appeal found that cl 7 does not originate from a contractual bargain in the usual context of contract law which relates to private law remedy. The Court of Appeal allowed the appeal premised on the following reasons:

(a) the plaintiff has secured a statutory lease and not a contractual lease subject to private law simpliciter. The defendant was exercising his public duty as the power to renew the lease is a power of the State Authority to alienate lands as provided for, under the NLC. In consequence, the plaintiff's mode of approaching the court and seeking for private remedy is unsustainable in law and ought to have been dismissed by the learned trial judge in limine (see *Ahmad Jefri* and *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd* [2015] 2 MLJ 509; [2015] 1 CLJ 357); and

(b) the specific performance sought by the plaintiff against the government and/or governmental bodies is unsustainable premised on s 29 of the Government Proceedings Act 1956.

[23] The Court of Appeal held that the plaintiff's claim in private law remedy ought to fail, however, that does not mean that the plaintiff cannot proceed again on its rights, based on public law relief, provided there is no legal or statutory impediment to do so. The Court of Appeal allowed the appeal by the defendant.

OUR DECISION

[24] The determination of the appeal herein is dependent on the construction to be accorded to cl 7 of the special conditions in the lease, which is a term for the option to renew the lease for a further period.

The law

[25] The power to alienate State Land is vested with the State Authority. Alienation of land by a State Authority is governed by s 76 of the NLC which empowers the State Authority to alienate State land for a term of 99 years or in perpetuity. Our case falls under the former, as the subject land was alienated under qualified title, for a lease for 60 years which ended in 2020 (refer to s 40 of the NLC).

[26] Therefore, the lease granted to the plaintiff under s 76 of the NLC, upon alienation of land under s 42 of the same, is a statutory lease. Upon alienation of State land, it has the right to impose express conditions on the land pursuant to s 120 of the NLC which reads:

> 120 Imposition of express conditions and restrictions in interest on alienation under this Act
>
> (1) Subject to the provisions of this section, *the State Authority may alienate land under this Act subject to such express conditions and restrictions in interest conformable to law as it may think fit*.
>
> (2) The conditions and restrictions in interest to be imposed under this section in the case of any *land shall be determined by the State Authority* at the time when the land is approved for alienation.
>
> (3) Every condition or restriction in interest imposed under this section shall be endorsed on or referred to in the document of title to the land; and in complying with this sub-section the State Authority shall, in any case where it imposes both conditions and restrictions in interest, distinguish between the two.

[27] The relevant provision in the NLC with regards to extension of alienated land for a term of years is s 90A which reads:

> 90A Extension of land alienated for a term of years
>
> (1) The proprietor of any land alienated for a term of years *may apply* to the State Authority for the term to be extended.
>
> (2) The application shall be made *before the expiry of the term* specified in the document of title.
>
> (3) Upon receiving any application referred to in subsection (1), the Land Administrator shall endorse, or cause to be endorsed, a note on the register document of title to the land to which the note relates.
>
> (4) The State Authority shall not entertain any such application unless the State Authority is satisfied with respect to every person or body having a registered interest in the land, either that he has consented to the application or that his consent ought in the circumstances of the case be dispensed with.

(5) *The approval or rejection of an application under subsection (1) shall be at the discretion of the State Authority, and such approval if given*, may be subject to —

(a) Payment of premium as may be determined by the State Authority; and

(b) Other charges as may be prescribed ...

(6) ...

The issue

[28] The issue is whether cl 7 creates a *contractual right* in favor of the plaintiff which is binding upon the defendant and hence such refusal to renew on the part of the defendant constitutes a *breach* of the plaintiff's right under the same which was a *private law right*.

Whether cl 7 creates a contractual right

[29] In this regard, lands are state matter pursuant to the Federal Constitution. The land administration organizational structure in Malaysia demarcates power to manage land to the State Authority.

'State Authority' is defined under s 2 of the NLC to mean 'the Ruler or The Yang di-Pertua Negeri of the State, as the case may be'. The defendant, the Director of Lands and Mines is appointed by the State Authority to exercise and perform any of the functions or duties (except to make rules) conferred or imposed on the State Authority by or under the NLC (s 12(1) of the NLC). The defendant is responsible to the State Authority for the due administration within the State of the provisions of the NLC (s 12(3) of the NLC).

[30] The defendant derived his power from the State Authority, which had delegated its powers pursuant to s 13 of the NLC.

[31] The powers of the State Authority when alienating State land is subjected to the provisions of the NLC. In alienating State land, whatever conditions imposed (express or special, as the case may be) by the State Authority, is in accordance to the provisions of the NLC. The State Authority could not exercise its power of disposal of any interest of State land other than in accordance with the powers conferred by the NLC and strict observance must be exercised when there is a prescribed mode of exercising such statutory powers.

[32] It is undisputed that the land in question is State land and alienated by the State Authority pursuant to the NLC. Therefore whatever conditions that comes with the land is subjected to the provisions of the NLC and cannot be inconsistent with the same.

[33] Can such alienation by way of a lease gives rise to a contract of lease between the State Authority and the lesee that is enforceable in private law?

[34] In this regard, this court in *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun dan satu lagi* [2018] supp MLJ 293; [2011] 4 CLJ 729 established the ratio, that mere approval of land to be alienated does not bind the State Authority contractually that would prevent the State Authority from revoking such approval, in the absence of registration. This decision is in accordance to the provision of s 78(3) of the NLC, which provides that:

> The alienation of State land shall take effect upon the registration of a register of title thereto pursuant to the provisions referred to in subsection (1) or (2) , as the case may be, and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

The court held that alienation of land cannot be given effect without completion of registration and presence of document of title, which established the law that prior to such completion the land still belongs to the disposal of the State Authority.

[35] On the same issue, we refer to the decision by this court in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123 which referred to an Australian case of *Cudgen Rutile (No 2) Pty Ltd and another v Gordon William Wesley Chalk* [1975] AC 520 (PC), where the Privy Council held that the Crown in Australia could not contract for the disposal of the interest of the Crown lands except in accordance with the powers conferred by a statute and accordingly, where a statute prescribed a mode of exercise of the statutory power, that had to be observed.

[36] The appellants in *Cudgen Rutile (No 2) Pty Ltd and another v Gordon William Wesley Chalk* were holders of a prospecting license under s 23A of the Mining Act 1898 which was issued by the Minister of Mines in an area of land. The license provides an option to renew for a further period of one year. On their application for renewal the Minister granted the renewal to prospect on the Crown lands for all minerals except coal, mineral oil and petroleum. However, the appellants discovered large mineral deposits on the Crown lands and applied for special mineral leases in respect of the minerals deposits which they discovered. The government refused to grant the applications, which led

to the appellants instituting legal proceedings for, inter alia, specific performance of the contract which they alleged existed to grant them the lease. The issue before the Privy Council turned on the power of the Crown to dispose Crown land by lease. Lord Wilberforce agreed with the submission by the Crown that it could not contract for the disposal of any interest in Crown lands unless under and in accordance with power to the effect as conferred by statute when he said as follows at p 533:

> ... when a statute, regulating the disposal of Crown Lands, or of an interest in them, prescribes a mode of exercise of a statutory power, that mode must be followed and observed, and if it contemplates the making of decisions, or the use of directions, at particular stages of the statutory process, those decisions must be made, and discretions used, at the stages laid down. From this in turn, it must follow that the freedom of the Minister or officer of the Crown responsible for implementing the statute to make his decisions, or use his discretions, cannot validly be fettered by anticipatory action and if the Minister or officer purports to do this, by contractually fettering himself in advance, his action in doing so exceeds his statutory powers.

[37] Similarly in *Western Fish Products Ltd v Penwith District Council and another* [1981] 2 All ER 204, a plaintiff purchased a disused factory for the purpose of manufacturing fish products. The plaintiff was informed orally on behalf of the local authority's chief planning officer that application for the established use certificate would be purely a formality. The plaintiff incurred expenditure as a result of such information. The English Court of Appeal held that, an estoppel could not be raised to prevent a statutory body from exercising its statutory discretion or performing its statutory duty. Therefore, even if the council's officers while acting in the apparent scope of their authority had purported to determine the plaintiff's planning application in advance, that was not binding on the Council because the powers of the Council was circumscribed under the Town and Country Planning Act 1971 to determine the applications. It was held that, '... the equity sought to be raised by the respondents would establish against the State Authority's rights in respect of State land which it is prevented by statute from creating other than in the prescribed manner'.

[38] Applying the principle as enunciated by the aforesaid cases and provisions, the alienation of land by the State Authority cannot give rise to a contract of lease which is in contravention with the NLC.

[39] Therefore, the learned trial judge had erred in law when he held that the defendant is bound by cl 7 'thereby giving up the discretion it may have in respect of renewing the lease' for the following reasons:

Even if cl 7 has such an effect (which we deny), it would not be binding on the State Authority, as it is not in accordance to the NLC, namely s 90A, as it prevent the State Authority from exercising its statutory discretion or performing its statutory duty. Any contract for the disposal of any interest of State lands has to be in accordance with powers as conferred by the NLC. As for the renewal of a lease, s 90A(1) and (5) of the NLC expressly provide for the discretion of the State Authority whether to approve or reject any application for the renewal of the lease. The learned judge failed to consider the provisions of the NLC in making those findings.

[40] In support of the learned trial judge's finding that cl 7 creates a contractual right in favor of the plaintiff which is binding upon the defendant and hence such refusal to renew on the part of the defendant constitutes a breach of the same, His Lordship referred to the following cases:

(a) *Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd* [1978] 1 MLJ 130;

(b) *Chong Pak Kwan @ Chong Shiu Fai v Kong Chung Loi @ Kong Sung Loi & others* [2002] MLJU 435; and

(c) *Evergreen Frontier (M) Sdn Bhd v The Director of Lands and Surveys, Sabah & Anor* [2005] 2 MLJ 644.

[41] The last two cases were decisions of the High Court and before the decision of *North East Plantations Sdn Bhd*. In any event, the excerpt quoted by the learned trial judge from the Federal Court case of *Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd* which states that:

> we must construe the special conditions endorsed on the document of title as they stand and as a whole to see what is the intention of parties

has to be read in its proper context.

[42] In any event, we do not see how the case of *Collector of Land Revenue, Johor Bahru v South Malaysia Industries Bhd* is of much help to the plaintiff's case. That case is in relation to an alienation of State land by the State Authority whereby an industrial lot was granted by the State Authority to the respondent company for a term of 60 years, subject to the provisions of the NLC and to a number of specified conditions referred to in the qualified title as set out under the heading 'Special Conditions' (s 109). The special condition in Form 11A of the lease was solely for the erection of a factory but the respondent company subleased to a urea company to use as a store for storing industrial chemicals. The issue is whether there is express condition restricting user and if there is, whether the respondent company has committed a breach.

[43] In finding that there was a breach of the special conditions, the case revolved on the interpretation of the word 'letting' and use' as found in the conditions that came with the land, the determination of which would conclude whether the respondent company had breached the conditions of the lease. However, what was said by Raja Azlan Shah FCJ, at p 133 is pertinent for our purposes:

> ... It is the respondent company's case that with the lifting of condition (iii) relating to transfer, charge and sub-leasing, it can sub-lease the whole land and *a fortiori* part of it to a urea company, provided the latter uses that part within the industrial context. It is therefore said that using that part for storing of industrial chemicals and fertilisers and as an office comes within 'using' in the industrial context. In my opinion, this line of argument is a little far fetched. *We are not here concerned with the case of landlord and tenant but one under the National Land Code*. The National Land Code is our own creation and is intended to be a complete code regulating the respective rights of the State and the occupier. In the former case it is in order to apply the well established principle of landlord and tenant that a covenant not to sub-let premises is not broken by sub-letting it (see *Esdaile & Ors v Lewis*). *In the present case different considerations apply.* Here, the restrictive covenants are in respect of both 'letting' and 'use'. However, the covenant in respect of 'letting' was lifted but not that with regard to 'user'. It still runs with the land and binds the respondent company.

[44] In proceeding to consider the issue of the breach of the conditions, the court therein referred to the provisions of the NLC, ie whether the use of part of the factory premises as a store for its own goods is not inconsistent with s 117(1)(a)(iv) of the NLC. This can be discerned when the court said at p 133:

> It must be noted that the land alienated is classified under category 'industry' (section 652) which means that its use is limited (implied) to industrial purposes which are elaborated in section 117(1)(a), as far as the case is concerned for the erection of the said factory and to use it for or in connection with 'inter alia, 'manufacture' ... and 'storage, transport or distribution of goods or other commodities'.

It was held that 'these implied conditions only operate to the extent that they are not inconsistent with any express conditions to which the land is subject (which is s 117(2) of the NLC). In other words, the implied conditions spelt out in s 117(1) of the NLC shall not be inconsistent with the express conditions referred to in the document of title ...'.

[45] The ratio of the case is this, when it comes to land alienated by the State Authority, the respective rights of the State Authority and the occupier of the lands is very much regulated by the provisions of the NLC and it cannot be at variance with the same. Even if we are to accept the interpretation by learned judge when His Lordship held that the defendant is bound by cl 7 'thereby giving up the discretion it may have in respect of renewing the lease', it is our

judgment that, that cannot be valid because it does not conform to s 90A of the NLC, which allows for the discretion by the State Authority whether or not to approve the renewal of the lease.

[46] The case of *Station Hotels Berhad v Malayan Railway Administration* [1977] 1 MLJ 112 relied on by the learned trial judge, relates to an action which was brought for vacant possession on a lease which had expired. This is not a case of a lease which was alienated by the State Authority. It was a lease between Malayan Railway Administration (a sole corporation under s 4 of the Railway Ordinance 1948) and Station Hotel Bhd. Malayan Railway Administration has the power to enter into contracts and sue thereon under s 4(2) of the said Act. Hence the approach in determination of the issue at hand is according to the law of landlord and tenant. It has got nothing to do with lease alienated by the State Authority under the NLC. The facts of this case are not on all fours with our present case.

[47] The plaintiff also referred to an Australian High Court case of *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 which the plaintiff said could provide additional guidance in interpreting cl 7 of our case. Again, this is a case of a private lease between two public authorities, Royal Botanic Gardens and Domain Trust and South Sydney City Council. It is not a case of alienation of land under a lease by the State Authority pertaining to State land. That case dealt with the dispute on what is the yearly rate payable subsequent to the first three years of the lease between both public bodies. The lessor had power to lease lands under the Domain Leasing Act 1961. The court considered principles of contractual interpretation such as the parole evidence rule, the circumstances in which evidence of the parties' prior negotiations and post contractual conduct may aid construction in determining what is the yearly rate payable of the lease.

[48] Those cases referred to, by the plaintiff, are of no assistance to the issue in the present case. Clause 7 is contained in a statutory lease which is subject to the provisions of the NLC as the lease is alienated by the State Authority pursuant to the provision of the same. The Court of Appeal did not err when it said that the lease is not a product of bargaining between the plaintiff and the State Authority. The conditions of the land were imposed by the State Authority when it alienated the land pursuant to the provisions of the NLC. Hence the alienation of the lease and renewal thereof is guided by the provisions of the NLC.

[49] It is our judgment that the effect of cl 7 is not as what the plaintiff suggests. The interpretation of cl 7 as suggested by the plaintiff (which was accepted by the learned trial judge) that it creates a binding obligation on the defendant to grant a new lease for a term of 30 years upon the plaintiff giving

notice, paying the appropriate premium and surrendering the current lease, is contrary to the provision of the NLC, namely:

(a) s 78(3) of the NLC which provides that:

> The alienation of State land *shall take effect upon the registration of a register of title* thereto pursuant to the provisions referred to in subsection (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

and

(b) s 90A of the NLC which provides that:

> (1) *The proprietor of any land alienated for a term of years may apply to the State Authority for a term to be extended.*
>
> (2) ...
>
> (3) ...
>
> (4) ...
>
> (5) *The approval or rejection of an application under subsection (1) shall be at the discretion of the State Authority*, and such approval *if given*, may be subject to —
>
> (c) payment of premium as may be determined by the State Authority; and
>
> (d) other charges as may be prescribed ...

[50] Apart from the aforesaid, a plain reading of cl 7 shows that, it does not impose a mandatory obligation on the State Authority to grant an extension of the lease for a further term upon the plaintiff exercising its option to renew. The said cl 7 merely provides for the procedural administrative steps that would follow, *in the event*:

(a) there is an application by plaintiff for an extension of the term of the lease; *and*

(b) the State Authority approves such application.

However, the facts in our case show the following:

(i) firstly, before the plaintiff exercises its option, the State Authority had informed the plaintiff that it would not be renewing the lease anymore. Hence the availability of the option is no longer there; and

(ii) secondly, there was *never any approval of the renewal of the lease* by the State Authority,

hence the administrative steps, (ie payment of an appropriate premium and rent, surrender the lease for the State Authority to re-alienate the land for the new renewal of the lease, impose conditions and/or restrictions of the lease and for the register of the lease on the register document of title) does not arise neither was it triggered.

In addition, there has to be an endorsement of the renewal of the lease on the title for the renewal of the lease to be effected. But in our case, it has not even reached that stage.

[51] In this respect this court in *North East Plantations Sdn Bhd* explained the administrative steps that would follow upon the approval of the alienation of any land by the State Authority. It concerns s 80(3) of the NLC which reads:

> (3) Subject to subsection 81(2), upon the approval of the alienation of any land by the State Authority under this Act and upon payment of all fees the Registrar *shall* prepare, register and issue a qualified title in respect of the land.

The question of law before the court in the aforesaid case, was whether the NLC confers upon the State Government the power to revoke the approval for alienation which had been granted by the previous State Government. This court held that alienation of land cannot be given effect to, without completion of registration and presence of document of title. Therefore, prior to such completion of registration, the land still belongs to the State. As the land belonged to the State, the appellant therein did not have rights on the land and the State Authority has the right to even reject payment of premium which already has been made. This court held that the words 'shall' present in s 80(3) explains the procedural administrative steps which the Land Administrator ought to follow *upon approval of the alienation of land.* Despite the presence of the word 'shall' in s 80(3) of the NLC, it was held that, it does not carry a mandatory obligation on the part of the Registrar to prepare, register and issue a document of title in respect of the land, in the absence of approval by the State Authority for the alienation of the land. Consequently, the Registrar was not bound to any of the procedures in ss 81–92 of the NLC although they were mandatory administrative steps because it is impossible for the Registrar to perform his perfunctory duty, when the State Authority cancels the approval. The rights of a person to land does not exist before the land is registered (s 78(3) of the NLC).

[52] Hence, the word 'shall' in s 80(3) of the NLC only applies upon the Registrar carrying out its function *after the approval by the State Authority and the State Authority has directed the Land Administrator to proceed with registration*. In the event the approval by the State Authority is withdrawn, then the Registrar's act to 'prepare, register and issue final title in respect of the land' does not arise.

[53] Therefore, pursuant to the decision of this court in *North East Plantations Sdn Bhd*, alienation of land cannot be given effect without the completion of registration and presence of the document of title. In other words, prior to completion of registration, as the land still belongs to the state, it is subject to the disposal of the State Authority. To sum up, the NLC provides the right of a person to land exists only after the land is registered.

[54] In our case, there was never any approval by the State Authority on the extension of renewal of the lease. This is not a case where the plaintiff submitted its option to renew and the defendant did not approve. This is a case where the plaintiff was already informed that the defendant would not be granting any renewal, years before the exercise of the option to renew was exercised by the plaintiff.

[55] The construction accorded to cl 7 as suggested by the plaintiff would create an absurd situation, which is, even without approval of the right to renew of the lease by the State Authority, the plaintiff automatically is given the renewal of the lease for a further term of 30 years upon the plaintiff exercising The option to renew.

[56] The State Authority maintains its discretion as provided for under s 90A of the NLC, whether to allow for the renewal of the lease in the event the plaintiff exercises its option to renew the said lease. More so in our present appeal, the State Authority had already informed the plaintiff and other lesees in the Larkin Area, years before the option to renew was exercised by the plaintiff, that the State would not be renewing any lease in the said area.

[57] Applying the principle as enunciated in *North East Plantations Sdn Bhd*, the construction as accorded by the plaintiff to cl 7 is therefore unsustainable.

[58] Given the aforesaid, cl 7 does not create a contractual lease between the State Authority and the lesee which is binding on the State Authority.

Whether the lease is enforceable by private law — The dichotomy between private law rights and the public law rights

[59] In the present case, essentially what was challenged was the decision of the State Authority in not granting the option to renew the lease for a further term. The defendant submitted that the correct mode to challenge a decision of the State Authority was by way of judicial review.

[60] Hence the issue is whether the plaintiff ought to have commenced the action by way of judicial review.

[61] The learned trial judge in his judgment stated:

> [58] Reverting to the instant case, the plaintiff's complaint is about the breach of its rights under cl 7, which is a private right of the plaintiff. There is no evidence to suggest that any other member of public has similar right to cl 7. Therefore, there is no public law element involved in the facts of the present case.
>
> [59] It is worthy to note that before the decision, the plaintiff would be able to enjoy tenure of a new lease for a term of 30 years (2050) however after the decision, that enjoyment was somehow affected and is now limited only to the year 2020. Therefore, the dominant issue in this case is the issue of private rights.

[62] Counsel for the plaintiff submitted that the COA approached the public law-private law dichotomy in a very strict and rigid manner and it is 'out of step with' the applicable legal principles. Counsel for the plaintiff asserts that, in considering *Ahmad Jefri* as a whole, certain passages from that decision have allowed for some uncertainty to creep in, when the courts below have had to consider which sphere has predominance. This is partly due to an impression created by the said decision that the jurisdiction of the courts is circumscribed by O 53 of the Rules Of Court 2012 ('the ROC') in particular with the passage in para 62 of the said case. Read with para 61 of the decision, the latter passage from para 62 strongly suggests that the courts are not permitted the flexibility accorded to the English courts due to the difference in the language in O 53, and any such flexibility can only be allowed on an exceptional basis.

[63] Counsel for the plaintiff also submitted that the Federal Constitution guarantees access to justice. The plaintiff referred to *Ho Ken Seng v Progressive Insurance Sdn Bhd* [2013] 2 MLJ 335; [2013] 2 CLJ 601 where it was held that s 38(1)(a) of the Bankruptcy Act 1967 had to be understood in a manner that did not fetter the appellant's right of access to justice. However, we find that the case of *Ho Ken Seng* is a case which involved a bankrupt (who was disabled and incapacitated from proceeding unless he obtains sanction from the DGI) who was challenging the very action that caused the disability and incapacitation. 'Access to justice' in that case should not be taken out of context.

[64] It was further submitted by the plaintiff that there is a need to preserve flexibility and to adopt a liberal attitude towards the co-existence of judicial review proceedings and actions for a declaration with regard to public law issues. 'Unless the procedure adopted is ill suited to dispose of the question at issue, there is much to be said in favor of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings'. Hence the necessity for this court to clarify *Ahmad Jefri*.

[65] This court was referred to the following cases in support of the flexible rule to be adopted:

(a) *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705:

Where Lord Bridge said that where the question to be determined is purely a matter of public law right, then the exclusivity principle remains. However, in examining 'the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him'.

Lord Bridge followed English House of Lords decision in *Wandsworth London Borough Council v Winder* [1985] AC 461 which is an exception to the general rule in *O'Reilly v Mackman* [1983] 2 AC 237, where Mr Winder was held to be entitled as of right to challenge the local authority's decision by way of defence in the proceedings which it had brought against him. Where the issue of a private right depending on a prior public law decision is raised as a defence to a claim, then the point does not have to be dealt with by judicial review;

(b) *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48:

Where Lord Slyn recognised the need for some flexibility as the precise limits of public law and private law were by no means worked out. The overriding question is whether the proceedings constitute an abuse of the process of the court; and

(c) in *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* [1997] 4 All ER 747:

The English Court of Appeal concluded that by merely opting for the wrong commencement process did not in itself demonstrate an intention to abuse process. That question is to be decided by reference to whether, in particular case, the choice of mode of commencement has significant disadvantages for the parties, the public or the court. Lord Woolf emphasised that the courts should not entangle itself with technical arguments involving public and private law issues and should instead focus on the practical consequences of pursuing each course of action. Hence, if an applicant is uncertain as which course to adopt, then judicial review should be favored.

[66] Consequently, the plaintiff submitted that there is the need to preserve flexibility as to the choice of the mode of commencement. The issue on whether a court is empowered to provide recourse of a nature to the dispute before it, is ultimately dependent on whether the court has jurisdiction as observed by Lord Lowry in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*.

[67] It is our judgment that, in suggesting for a flexible approach to be adopted, counsel for the plaintiff failed to address its mind to the fact that O 53 of the ROC is enacted specifically to address judicial review of the decisions of public authorities when an infringement of individual's rights to which he is entitled to be protected under public law. This is a special provision for an aggrieved party seeking relief, incorporating a declaration against a public authority for infringement of his rights to which he was entitled to be protected under public law, as opposed to the general provision under O 15 r 16 of the ROC or s 41 of the Specific Relief Act 1950. In this regard this court in *Ahmad Jefri* has explained extensively that:

> [61] Aside from mandamus, prohibition, quo warranto and certiorari, or any others described under the pre-amended O 53 RHC, an alternative remedy for an aggrieved party seeking relief against a public authority for infringement of rights to which he was entitled to be protected under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is commonly accepted that O 15 r 16 RHC also provides the High Court with such power (see Lord Diplock' s judgment in *O'Reilly v Mackman* at p 1127). However O 53 RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration (as provided by s 41 of the Specific Relief Act) against a public authority for infringement of his rights to which he was entitled to be protected under public law, to follow. It is our view that *when such an explicit procedure is created (as compared to a general provision set out under O 15 r 16 RHC) to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O 53 RHC, otherwise it is liable to be struck off for abusing the process of the court. This general rule enunciated in O'Reilly v Mackman has in fact been acknowledged by this court in Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors and repeated in YAB Dato' Dr Zambry. However, like all general rules, there are exceptions.* This again was recognised by Lord Diplock in *O'Reilly v Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons. Then of course, *there is the exception for a claim against the public authority for negligence as decided in Majlis Perbandaran Ampang Jaya v Stephen Phoa Cheng Loon & Ors. There may be others and these 'are left to be decided on a case by case basis' as spoken by Lord Diplock in O'Reilly v Mackman. The circumstances in YAB Dato' Dr Zambry is obviously one such exception where this court found that a challenge by the appellants on their suspension from attending the State Legislative Assembly is a matter that affects their legal status. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O 53 RHC.*

[68] This court in *Ahmad Jefri* acknowledged the various decisions on this point and the dichotomy between public law rights and private law rights and it is our view that *Ahmad Jefri* had clarified the dichotomy on what was termed by Lord Lowry in *Roy v Kensington and Chelsea and Westminster Family*

Practitioner Committee as 'procedural minefield'. A

[69] This court in *Ahmad Jefri* has set out the steps to be adopted in determining whether a complaint is amenable for judicial review. To qualify, there must be sufficient public law element in the decision made. For this it is necessary to examine both the source of the power and the nature of the decision made, whether the decision which was made was under statutory power. There must be the presence of a public law element necessary to attract the remedies of administrative law for the plaintiff to be amenable for judicial. B C

[70] *Ahmad Jefri* established the principle that, a challenge on the use of appropriate procedure in the commencement of an action is very much fact-based. When deciding on such matter, it is necessary for the Judge to ascertain first whether there is public law element in dispute. If the claim was based solely on substantive principles of public law, the appropriate procedure should be by way of O 53 of the ROC. In cases where there is a mixture of public and private law, then the court must ascertain which of the two is predominant. The proceedings under O 53 of the ROC must be adopted for claim that has substantial public law elements. Failure to do so may result in the process being set aside on the ground that it abuses the court's process. D E

[71] In *Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor* [2007] 4 MLJ 422; [2007] 3 CLJ 377, the appellant , the former Deputy Prime Minister sued the Prime Minister by OS for a declaration that they had acted in contravention of the Federal Constitution in dismissing him as the Deputy Prime Minister and that he is still a Minister in the Cabinet. The defendants applied to strike out the plaintiff's claim under O 18 r 19(1) of the RHC, on grounds, inter alia, that the OS was an incorrect procedure and that it should be by way of judicial review under O 54 of the RHC. The learned High Court judge allowed the application to strike out. The plaintiff appealed to the COA whereby the appeal was dismissed. The Court of Appeal remarked that: F G

> This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be a simple procedure, will deprive the public authority in this case the Federal government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O 53. H I

[72] The same approach was adopted by the COA in *Robert Cheah Foong Chiew v Lembaga Jurutera Malaysia* [2009] 1 MLJ 676; [2009] 1 CLJ 192 where the Court of Appeal held that:

> ... It would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under the public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities. Secondly, we find that in substance and in fact what the appellant is requesting in his originating summons involves principally and primarily public law rights rather than private law rights. Thirdly, we are conscious of the English House of Lords decision in *Wandsworth London Borough Council v Winder* [1985] AC 461 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 2 WLR 239 which says:
>
> > ... where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.
>
> We are of the view that the prayers sought by the appellant involve principally and primarily public law rights rather than private law rights. When they overwhelmingly concern public law rights, then the correct approach should be by way of judicial review under 0 53 RHC rather than by way of originating summons.

[73] However, this court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, although agreed with the general rule as set out in *O'Reilly v Mackman*, said that, it does not apply to a claim against a public authority for negligence. It was held that such claim can be commenced by way of a writ. To appreciate the reasoning behind the findings of this court in the aforesaid case, it is pertinent that we reproduced the relevant parts of the judgment delivered by Steve Shim CJSS:

> I think the brief facts in *Trustee of Dennis Rye Pension Fund* relied on by the Court of Appeal ought to be stated. There, the plaintiffs were served with repair notice under the Housing Act (UK) requiring work to be carried out to certain houses to render them fit for human habitation. They then applied to the Sheffield City Council for improvement grants on the grounds, inter alia, that the works had not been completed to its satisfaction. The plaintiffs' commenced private law actions against the council claiming the sums due under the grants. The council contended that if the plaintiffs had any grounds of complaint (which it did not accept), the only appropriate procedure was an application for judicial review and not an ordinary action. It accordingly applied to strike out the plaintiff's(sic) claim under RSC O 18 r 19 and the inherent jurisdiction of the court. The district judge struck out the claims; but the judge allowed the plaintiff' appeal and dismissed the council's application. The council appealed to the Court of Appeal.

The Court of Appeal presided by Lord Woolf MR held that when performing its role under the Local Government & Housing Act (UK) in relation to the making of grants, a local authority was in general performing public functions which did not give rise to private rights; but once an application for the grant had been approved, a duty to pay it arose on the applicant fulfilling the statutory conditions and that duty would be enforceable by an ordinary action. The court further emphasised that although, in the case before it, there was a dispute as to whether those conditions had been fulfilled, any challenge to the local authority's refusal to express satisfaction would depend on an examination of issues largely on fact — that furthermore, the remedy sought for the payment of a sum of money was not available on an application for judicial review. The court concluded that an ordinary action was the more appropriate and convenient procedure and consequently that the plaintiff's action were not an abuse of process. The appeal was therefore dismissed.

It is clear that when the speeches by Lord Woolf MR and Pill, LJ are read in their proper perspective, they explicitly recognise that the remedies for protecting both private and public rights can be given in private law proceeding and an application for judicial review. It is pertinent to note the observations made by Lord Woolf MR in explaining the seminal decision in O'Reilly v Mackman [1983] 2 AC 237 *when he said …*

It is in the light of the established principles stated above that the respondents in our case maintain that the Court of Appeal has erred in holding that their only cause of action against MPAJ lay in the area of public law for post collapse liability. The respondents have relied on ordinary tort principles for their claims of negligence. In this, they are amply supported by established authorities. They should be entitled to file their claims against MPAJ by way of writ of action.

[74] With the aforesaid authorities in mind, we now come back to our present case, where the learned trial judge was of the view that the plaintiff's complaint is about the breach of its rights under cl 7, which is a private right of the plaintiff. The learned trial judge also held that there is no other evidence that any other member of the public has a similar right to cl 7. The learned trial judge concluded that there is no public law element involved in the facts of the present case.

[75] It is our view that the learned trial judge took a very simplistic view in arriving to a conclusion that the complaint by the plaintiff was on the breach of its rights under cl 7, which was a private law right specific to the plaintiff and hence there is no public law element in the facts of the present case. Although at first blush it appears that it concerns a breach of condition in a lease, which may seem to be a private law matter, essentially the action by the plaintiff is a challenge on the decision of the State Authority in refusing to renew the lease.

The learned trial judge failed to adhere to the steps that ought to be adopted when determining whether a complaint is amenable to judicial review as enunciated by this court in *Ahmad Jefri*. The learned trial judge failed to

consider the source of the decision and the nature of the decision which had affected the plaintiff.

[76] In determining whether a decision is amenable to judicial review, the court looks into the function of the decision maker. Public law decisions made by public body are amenable for judicial review. Public body has its source of power created by or pursuant to a statute. The power to alienate State land by the granting of the lease and the renewal thereof are acts by the State Authority pursuant to a statutory source of power, which is the NLC. There are statutory conditions and restrictions imposed upon the State Authority on the manner of alienation of land, vis a vis alienation in the form of a lease and renewal thereof under the NLC, which underpins the public law element in this case.

[77] There are specific statutory provisions in the NLC which bears directly upon the right of the State Authority in the exercise of its discretion on whether to allow the renewal of the lease (s 90A of the NLC). Hence the State Authority performs a public function and has to exercise its discretion taking into account public interest. This clearly injects the element of public law necessary in this context to attract remedies of administrative law making it amenable for judicial review. Our case is not a situation where the line of distinction between the public law element and the private law elements is blurred.

[78] The reason for the suggestion for a flexible approach to be adopted as to whether to go for judicial review is precisely that, it is difficult to determine which element is predominant. This is evident when Lord Woolf in *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* said at pp 755–756 that the procedure of distinguishing private law rights and public law rights has become increasingly complex and technical. Lord Woolf further said that the determination of such rights not only involve technical questions of distinctions between public and private rights and bodies, but also the practical consequences of the choice of procedure which have been made. However, Lord Woolf emphasised that the courts should not entangle itself with technical arguments involving public and private law issues and should instead focus on the practical consequences of pursuing each course of action. Thus, to resolve such a predicament, Lord Woolf came up with the resolution that if an applicant is uncertain as which course to adopt, then judicial review should be favored. But that is not the situation in the present case. The source of the power of the State Authority and the nature of the decision predominantly show undoubtedly public law elements.

[79] Further, a perusal of the reliefs prayed for, by the plaintiff, show that the prayers predominantly fall within the realm of public law (refer to para 9 of this judgment). It was in evidence that the government has plans to develop the Larkin Industrial Area into a housing development area. Hence the decision

not to renew the leases in the said area. A decision which is in favor of the plaintiff would result in the land being given on lease to the plaintiff for another 30 years. This would affect the future development of the Larkin Industrial Area which the State Authority plan to do. The Larkin Industrial Area not only involve the lease held by the plaintiff but also other leaseholders in the said area. In other words, the decision made by the State Authority would not only affect the title of the plaintiff but also affect the other titles within the Larkin Area.

[80] It is not open to a litigant to circumvent the safeguards given to the public authorities under O 53 of the ROC by resorting to other ordinary process, such as a writ action. Although s 41 of the Specific Relief Act and O 15 r 16 of the ROC provide for the remedy of a declaration, these are general provisions as opposed to a specific provision enacted by Parliament for judicial review of decisions of public bodies where infringement of rights are concerned. The stringent conditions present in O 53 of the ROC is to protect those entrusted with public duties against groundless, unmeritorious or tardy harassment that were accorded to statutory bodies or decision making public authorities by the said order. The public interest in good administration requires expedition in disposing of claims against public authorities and a sieving mechanism to weed out unmeritorious claims by the leave requirement under the said O 53 of the ROC. Hence the flexibility approach as suggested by the plaintiff would not stand in view of the provision of O 53.

[81] This court in *Ahmad Jefri* states that:

> ... generally the court should be circumspect in allowing a matter which should be by way of O 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O 53 redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind.

[82] In *Kelana Megah Development Sdn Bhd v Kerajaan Negeri Johor and another appeal* [2016] MLJU 1649 the Court of Appeal applied *Ahmad Jefri* and held that:

> ... The challenge by the appellant is clearly more on the exercise of the power conferred by law on the first respondent. It is indeed an exercise of the power by the public authority under public law which makes the public law element more apparent and predominant than the private law ingredient. Accordingly, the challenge to such exercise of the first respondent's power under the law should be mounted by way of a judicial review under O 53 of the Rules of Court 2012.

[83] The plaintiff referred us to *Leo Leslie Armstrong (as the President and Committee of The Young Men's Christian Association of Kuala Lumpur)*

(Persatuan Pemuda Kristian Kuala Lumpur) v Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (previously held by Majlis Mesyuarat Kerajaan Negeri Selangor) [2015] 1 MLJ 255; [2015] 2 CLJ 10, where this court held that the dominant issue was the issue of private rights. The appellant therein filed an originating summons for a declaration, inter alia, to declare the conversion of the freehold tenure of the two lots to leasehold was ultra vires the NLC, and null and void and for the same to be converted to freehold tenure. Surely this concerned very much the private rights of the appellant, ie the private law element is predominant. There was evidence that there was agreement between the parties prior to the subdivision and there were also exchanged of letters between the parties.

[84] Therefore, in *Leo Leslie Armstrong*, although the appellant's point was well taken, however it was emphasised that whether private law element is more dominant would depend very much on the facts and circumstances of the case. This case is not an authority to support the contention that in the present action, the appellant should have the option of either to proceed under O 53 of the ROC or otherwise to proceed by way of an ordinary action. At best it serves as an example where the private law element was dominant, by virtue of the circumstances of the case.

[85] The power to renew a lease is a power of the State Authority to alienate lands, which is a power provided for by the NLC. The defendant was thus exercising a public duty in respect of State land. It is an exercise of power by a public body under public law which makes public law predominant than private law element. There is no difficulty nor complexity to determine which element is predominant.

[86] Hence the challenge to such exercise of the State Authority's power under the law ought to be mounted by way of judicial review under O 53 of the ROC. Further, the legitimate expectation raised by the plaintiff could not be regarded as a right in private law. We will be elaborating on the issue of legitimate expectation in the later part of this judgment.

[87] *Leo Leslie Armstrong* involved the appellant only, where after 45 years after subdivision took place, the appellant filed the originating summons. Our present case concerned cl 7 of the special conditions of the lease of the plaintiff, and there was evidence to show that the decision not to renew the leases was applicable to the whole Larkin Area, not just the plaintiff. It involved others who are holding the land on leasehold similar as the plaintiff.

[88] Given the facts of the present case where there is no complex distinction between the public law rights and the private law rights, we do not see the need to adopt a flexible approach in view of the provision of O 53 of the ROC. Neither can we adopt the procedure as suggested by the Court of Appeal in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 MLJ 413; [2002] 2 CLJ 697 which referred to the judgment in *Trustees of the Dennis Rye Pension Fund and another v Sheffield City Council* [1997] 4 All ER 747 at p 755 that:

> ... If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of the cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave...'

[89] *Ahmad Jefri*, correctly pointed out why we could not adopt the procedure as suggested by the Court of Appeal in *Sivarasa Rasiah*. Firstly, what was suggested by the court in *Sivarasa Rasiah* to adopt a flexible approach was mere obiter as that was not the issue in that case. The issue was with regards to leave for judicial review. Secondly, our O 53 of the ROC does not contain a provision to allow the court to be flexible by directing an application made under O 53 of the ROC to be converted into a writ action if the latter is found to be a more suitable process, unlike the English provision.

[90] Therefore, as the plaintiff is challenging the decision of a public body, the plaintiff could have commenced this action by way of a judicial review application since the public law element was evidently predominant.

[91] Therefore, the plaintiff's claim in private law remedy is clearly unsustainable. The Court of Appeal did not err in this respect. The lease is not enforceable by private law.

Whether cl 7 in the conditions afforded the plaintiff a legitimate expectation for the lease to be renewed

[92] The learned trial judge held that the plaintiff has legitimate expectation of a guaranteed and an automatic right to a renewal of the lease of 30 years.

The claim of legitimate expectation is a claim derived from common law in equity. The rationale of invoking such a principle is to encourage good administration and to prevent abuses by decision makers.

[93] This court in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123 has dealt with such similar claim. There, the respondents built houses on a piece of land and paid ground rent to the owner thereof. The land was subsequently acquired. As a result, the respondents were allotted lots on a piece of land in Ulu Temiang for resettlement and was allowed by the collector to build houses on those lots. However, the land was then alienated to Lesco and the respondents and others who were occupying other lots on the land, were ordered to leave. They were offered compensation and options to purchase low costs houses in a proposed housing estate to be developed on that land. The respondents refused the offer and contended that they were permitted to stay on the land on a permanent basis with a promise that titles would be granted to them for the lots that they occupied. The respondents commenced a suit against the State Government and Lesco. The issues that were raised were, inter alia, whether the respondents had acquired an equitable right or interest to remain on the lots allocated to them.

[94] In answer to the issue, this court referred to s 48 of the NLC (which prescribed that no title to State land shall be acquired by possession, unlawful occupation or occupation under licence for any period whatsoever) and s 78(3) of the NLC (which provides that the alienation of State land shall take effect on the registration of a register document of title) and held at p 128 that the 'statutory provisions by themselves would appear to provide a complete answer to and inhibit the interpolation of any equity with regard to the respondents' claim. There can be no intervention by equity in the face of the specific legislative provisions of the Code'. As Lesco had been alienated the land, they were rightfully entitled to the ownership and the consequential rights. Although the decision of the Federal Court in *Lesco* may be open to criticism, it was, nevertheless, based on the law.

[95] The courts will generally grant judicial review of an administrative decision premised on legitimate expectation where a public authority has made a representation or promise to the individual *within its powers*. In other word, the representation and promise must be *within the law*. In addition, the individual has to show that the representation was a clear and an unambiguous promise, an established practice or a public announcement.

See:

(a) *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors* [2018] 1 MLJ 633;

(b) *Regina v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA); and

(c) *Nadarajah and another v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[96] The fact remained that the State has a change of policy and plan to develop the subject land and hence renewal of the lease is no longer feasible. The question is: to what extent is legitimate expectation applicable in the face of a change in policy in the public bodies, vis a vis the State Authority? In this regard we refer to the decision of this court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 where this court held that:

> For our part, we prefer the view of Simon Brown LJ in *Ex parte Baker* (ibid) and Sedley J in *Ex parte Hamble* (ibid) as we find the reasoning there more persuasive. It is also a view which appears to be supported by de Smith , as the following extracts from his book, *Judicial Review of Administrative Action* (5th Ed), indicate (at para 13-034):
>
> > Given the duty of a public body not to fetter its discretion, under what circumstances will a legitimate expectation be protected in the face of a change in policy. *Clearly, the change in policy must be 'a lawful exercise of discretion'* (per Lord Scarman in *re Findlay* [1985] AC 318 338). The body's discretion to alter its policy must therefore be exercised after taking into account relevant considerations, and ignoring the irrelevant. The body must also pursue authorized and not extraneous purposes. These considerations and purposes can include matters such as the need to maintain national security and matters of public policy. Nor should the discretion be exercised unreasonably — for example, simply in order to confound the recipient of the expectation, or in bad faith. The conduct of the recipient of the representation should not be relevant to a decision to revoke the representation.

[97] In the case before us, there was nothing shown by the plaintiff that there has been a representation that constituted a clear and unambiguous promise, an established practice or a public announcement that there is to be a renewal of the lease upon the exercise of the option to renew by the lesee. Neither was it shown that the change of policy was premised on an unlawful exercise of discretion. In fact, in 2014 the State Authority already informed the plaintiff and other land owners of the State's plan to develop the land into housing area and hence the State Authority would not be renewing the lease in the Larkin Area. That was six years before the lease for the plaintiff expired. Thus, it cannot be said that the change of policy was based on irrelevant considerations or as being unreasonable. It has not been proven otherwise anyway.

[98] As for the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 which was relied on, by the

learned trial judge, we do not see any reason to depart from the pronouncement of the law by this court in the aforesaid case. However, the facts in the aforesaid case is distinguishable from the facts in our present appeal, as it has nothing to do with the alienation of State land under the NLC.

[99] The issue before the High Court and the Federal Court in *Sri Lempah* were on the scope and extent of the powers of the State Government to have a policy where the land owner must give up his title in perpetuity (which has been registered in his name) in exchange for a leasehold so as to have his application for conversion or subdivision approved; as well as the power of the Land Executive Committee being the administrative arm of the Government to impose such conditions in carrying out the State Government policy. Here the land is obviously not State land and the High Court and the Federal Court were dealing with the exercise of discretion by the Land Executive Committee under s 124 of the NLC to approve any application by a proprietor of any alienated land for a change in the category of land use, express conditions and restrictions in interest endorsed on the title. Section 124(2) and (4) provides that, the State Authority may, in approving any application under s 124(1) for a change in the category of land use, express conditions and restrictions in interest endorsed on the title, impose any new condition which it deems fit. However, such condition must be reasonable for the purpose of development of the land in question. The Federal Court held that 'in considering the applications by the Land Executive Committee should act fairly and not arbitrarily and should bear in mind that it had already approved the application subject to other conditions set out therein.' It was for that reason that Raja Azlan Shah CJ Malaya (as His Majesty was then) said at p 148:

> ... it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than ultra vires. It had exceeded its power and the decision was therefore unlawful as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly only when acting reasonably ...

[100] Although the principle of legitimate expectation has been accepted in Malaysian jurisprudence, the State Authority does not owe the plaintiff 'legitimate expectation' as the NLC expressly provides that rights of a person to land exists only after the land has been registered, and such doctrine cannot override the express statutory power vested in the State Authority. The decision of the learned trial judge that there was a legitimate expectation in the instant case militates against the provision of s 78(3) of the NLC and the decision of this court in *North East Plantations Sdn Bhd*, when this court held that:

> [29] Kami juga berpendapat bahawa keputusan majoriti Mahkamah Rayuan adalah tepat apabila dinyatakan 'Whether or not the doctrine of legitimate expectation

applies depends on the facts of each case, it cannot and should not override the express statutory powers vested in the State Authority. A

[101] Another case which fortifies this point is the case of *Hotel Sentral (JB) Sdn Bhd v Pengarah Tanah dan Galian Negeri Johor, Malaysia & Ors* [2017] 5 MLJ 116 where the claimant, Hotel Sentral claimed that it had legitimate expectation for a strip of road next to the hotel be made a road reserve. The High Court decided in favor of the Pengarah Tanah dan Galian. Aggrieved, Hotel Sentral appealed to the Court of Appeal which overturned the decision of the High Court. An appeal to this court resulted in this Court reversing the decision of the Court of Appeal and affirmed the decision of the High Court when it followed the decision of *North East Plantations Sdn Bhd*. B C

[102] In our judgment this proposition that cl 7 gives a legitimate expectation to the plaintiff for a renewal of another 30 years of the lease, has to be looked at, in the face of the expressed provisions of the NLC, namely, ss 40, 42, 76, 78(3), 80(3) and 90A of the NLC. Clause 7 must be viewed in the context of the scheme of the NLC as a whole. As s 90A provides for a specific manner in which the extension of a lease may be granted, such provision must be adhered to. The State Authority cannot contractually fetter its powers of discretion, given the expressed provision of s 90A as that would amount to exceeding his statutory powers. In addition, premised on *North East Plantations Sdn Bhd* until and unless there is registration of the interest on the land, the land shall remain as State land. In this case there has not been any approval for the renewal of the lease, what more registration or endorsement of a memorial to effect such extended term on the register of title to the land and on the issue document of title. D E F

[103] The NLC expressly prescribes a specific mode for alienation of state land, for a term of years. In renewal of a lease, s 90A provides the various steps to be taken before the issuance of the interests on the land, in this instance the renewal of the lease. The NLC provides for a complete code which regulates the respective rights, duties and liabilities of the State Authority and its agents on one hand and the registered proprietor of alienated land on the other (*Pemungut Hasil Tanah, Kota Tinggi v United Malayan Banking Corpn Bhd* [1981] 2 MLJ 264). G H

[104] In any event, there is nothing that was before the court that showed that the State Authority had acted in excess of the powers given to it by Parliament in the NLC. I

[105] Therefore cl 7 in the conditions does not accord the plaintiff a legitimate expectation for the lease to be renewed, as legitimate expectation cannot override the express statutory provisions of the NLC.

Relief on specific performance

Whether specific performance is sustainable against the defendant:

[106] The plaintiff submitted that it was entitled to commence the suit by way of an OS. It was further submitted by counsel for the plaintiff that, the question of specific performance not being available as a remedy did not arise as the OS was not against Government of Johor, but rather against the Director of Lands and Mines. In support, the plaintiff referred to the judgment of Abdoolcader FJ in *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors; Lesco Development Corporation Sdn Bhd v Yap Chong Lan & 12 Ors* [1984] 2 MLJ 123.

[107] It is our judgment that, this submission by the plaintiff is seriously flawed because, Director of Lands and Mines is an officer of the Government, be it, the State. In fact the case of *Government of the State of Negeri Sembilan & Anor v Yap Chong Lan & 12 Ors* referred to, by the plaintiff, is not an authority that established that the State Authority is not a government body. It merely state that actions or proceedings involving land matters in the State ought to be brought in the name of the Director of Lands and Mines of a particular State. This is because s 16(2) of the NLC requires that any suit or proceeding by or against the State Authority ought to be brought in the name of the Director of Land and Mines of the State.

[108] As the relief sought by the plaintiff is specific performance against the Director of Lands and Mines, who is an officer of the State Authority, which is a government body, such relief is not sustainable pursuant to s 29 of the Government Proceedings Act 1956. Section 29(1) reads:

> 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that —
>
> (a) Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and ...

[109] In dealing with s 29 of the Government Proceedings Act 1956 which relates to injunction against the government, the Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751, held:

> Notwithstanding the High Court's discretion to grant an injunction, s 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s 54 of the SRA prohibits the grant of an injunction against any Malaysian government department. The words of s 29(1)(a) of the GPA are quite clear and there is no reason to depart from it.

Hence the relief of specific performance is not sustainable against the defendant.

The relief by the plaintiff for the issuance of Borang 12A

[110] The plaintiff's prayer in its relief sought for, (which is consequent to the prayer for specific performance (prayer 1)), an order from the court for the defendant *to issue Borang 12A in accordance to s 197* of the NLC and all other relevant and necessary forms and/or documents which are required and relevant to the plaintiff (prayer 2). This prayer was granted by the learned trial judge.

[111] In this regard we refer to s 197 of the NLC which provides that:

> 197 Applications for approval of surrender of whole.
>
> (1) Any application for approval by a proprietor wishing to surrender the whole of the land comprised in his title shall be made in writing to the Land Administrator in Form 12A, and shall be accompanied by —
>
> (a) such fee as may be prescribed;
>
> (b) all such written consents to the making thereof as are required under paragraph 196(1)(c); and
>
> (c) unless the proprietor alleges that it is for any reason incapable of production , the issue of document of title to the land.
>
> (2) ...
>
> (3) ...

[112] However, there was never any instance in the facts of our present case, that the title was ever surrendered to the defendant. In this case as the lease has already expired, the subject land reverted and vested to the State Authority. Section 131 of the NLC then applies. Section 131 is applicable as if there was a forfeiture by the State Authority in accordance with s 199 of the NLC. Section 199 of the NLC provides that:

> 199 Revesting of land and destruction of issue document
>
> (1) Upon the making of any memorial pursuant to sub-section 198, the land to which it relates shall revert to and vest in the State Authority as State land; and the provisions of section 131 shall apply as if the land reverted pursuant to a forfeiture.

As the land belongs to the State Authority, any alienation by the State Authority would be under s 76 of the NLC. Alienation will come into effect upon registration pursuant to s 78 of the NLC.

[113] In matters pertaining to re-alienation of land, subsequent to approval by the State Authority pursuant to section 197 of the NLC, the State Authority is empowered to determine the area, payment and nature of title which the land would be subjected to (s 79(2) of the NLC). The subject land subsequent to the surrender will then be subjected to s 78 of the NLC.

[114] Apart from the provisions of the NLC which relates to the surrender of title and re-alienation thereof of the subject land, what is to be noted is that once the land is surrendered and vested to the State Authority, the land become free from any conditions or restrictions of interest or title and all buildings built on the land are subject to State Authority. Any condition or restriction with regards to the subject land will no longer exist which includes cl 7 which has been endorsed on the plaintiff's title. In this regard we refer to s 105(2) of the NLC which provides:

> 105 Duration of conditions and restrictions in interest
>
> (1) Every condition or restriction in interest imposed by or under this Act shall, except where it is otherwise provided by this Act or the context otherwise requires, commence to run from the date of alienation of the land to which it relates.
>
> (2) Every condition requiring continuous performance and (unless the context otherwise requires) *every restriction in interest, shall continue in force until the reversion to the State Authority* of the land to which it relates; and every condition subject to a fixed term shall continue in force according to the tenor thereof.

Whether option to renew in cl 7 endorsed pursuant to s 120 of the NLC in the title is conformable to law

[115] This issue was never addressed by the learned trial judge nor the Court of Appeal, however it was submitted by the defendant in the Court of Appeal in its written submission and also before us in its oral and written submission.

[116] The plaintiff's stand is that cl 7 in the title (express condition) created a binding contract of lease between the State Authority and the plaintiff. The plaintiff's argument is that cl 7 or the option to renew suggests that the State Authority would be obligated to issue a renewal of the lease as it has contracted to do so. This was accepted by the learned trial judge.

[117] The defendant's position is that cl 7 is ultra vires and unenforceable. Any express condition granted, is derived from the exercise of the defendant's power under s 120 of the NLC.

[118] In this regard, we refer to s 120(1) of the NLC, which provides that the State Authority may alienate land under this Act subject to such express conditions and restrictions in interest conformable to law as it may think fit. The conditions and restrictions in interest to be imposed on any land shall be determined by the State Authority at the time when the land is approved for alienation.

[119] It is our judgment that, to construe cl 7 as suggested by the plaintiff would deprive the State Authority of the control over State land. That construction as suggested by the plaintiff, would have the effect of overriding the statutory provisions of s 90A(5) of the NLC specifically, where the discretion is on the State Authority to approve any renewal of a lease for a further term. Taking that interpretation of cl 7 would render cl 7 to be *not conformable to law*. Although the plaintiff objected to this issue stating that it was never a point addressed by the High Court and the Court of Appeal in its judgment, however we did address the point (in the earlier paragraphs of this judgment) that to construe cl 7 as suggested by the plaintiff would have the effect of negating ss 80(3) and 90A of the NLC, which means that *to construe cl 7 as suggested by the plaintiff would not be in conformable to law*. Hence, it is unavoidable that this issue of 'conformable to law' needs to be addressed, no matter how one look at it.

[120] However, be that as it may, it is also our judgment that, a plain reading of the wordings of cl 7 does not give the effect that, it is mandatory for the defendant to grant an automatic renewal of the lease for a further term upon the plaintiff exercising its option to renew. We do not see how the plaintiff could construe cl 7 the way it did. Clause 7 merely provides for the plaintiff to exercise its option to renew the lease before the expiry of the term, but it does not mandate the State Authority to grant an automatic renewal to the plaintiff. Once the plaintiff exercises its option to renew, the stages of application for renewal and approval by the State Authority would follow. Such application to renew is subject to the discretion of the State Authority as stipulated under s 90A of the NLC. The State Authority may/may not allow for the renewal of the lease.

[121] Hence, following our construction of cl 7, the argument that cl 7 is ultra vires or not in conformable to law does not arise. It is ultra vires and not conformable to law if one is to apply the construction of cl 7 as accorded by the plaintiff. It is our judgment that the construction as accorded by the plaintiff is seriously flawed.

Qualified leasehold titles

[122] It was submitted on behalf of the plaintiff that the effect of qualified leasehold is intended to be equal to a final title as stated in s 176(2) of the NLC which is to confer on the proprietor the like rights in every respect as those conferred by final title. The case of *Yap Lai Yoke v Chin Fook Wah & connected case* [1984] 2 MLJ 274 was referred to as support. However, the facts of that case need to be understood. The issue of the rights under qualified title as being equal to rights of a final title in the aforesaid case is in the context of a dispute of trespass to land between two parties where both had qualified titles. The court was comparing to the strength of the titles between the two parties to determine who had better titles in determining on the issue of trespass. We do not see any relevance of the qualified title would have any effect on the issue which is to be determined.

CONCLUSION

[123] From the preceding paragraphs, it is our view that the alienation of land by way of s 76 of the NLC read with cl 7 does not give rise to a contractual lease between the State and the lesee, the consequence of which, private law remedy is available to renew the lease for another 30 years. Clause 7 does not originate from a contractual bargain in the usual context of contract law which relates to private law remedy. It is part of the conditions that came with the lease granted to the lesee which is subject to the provisions of the NLC.

[124] The lease secured by the plaintiff is a statutory lease which is not subject to private law. The power to renew the lease conferred on the defendant is derived from the NLC which he exercises under the authority of the State to alienate lands as provided for, under the same.

[125] Therefore, the plaintiff's mode of approaching the court seeking for private law remedy is unsustainable in law. The learned trial judge ought to have dismissed the originating summons in limine.

[126] Given our analysis as aforesaid, we answer the leave question in the negative.

[127] The appeal by the plaintiff is dismissed with costs of RM80,000. The decision of the Court of Appeal is affirmed.

Appeal dismissed with costs of RM80,000.

Reported by Ahmad Ismail Illman Mohd Razali